(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

Cr.Appeal No. 459 Of 2004

( Memorandum of Cr.Appeal U/s 374(2) of Cr.P.C. )

928/04
12/5/04
Copyist Clerk
Advocate

Appellant In Jail : Moha Yadav S/o Narayan Yadav aged 27 years, r/o Tatibandh Sahu Samajik Bhawan Ke Pass Thana Amanaka District Raipur (CG).

Versus

R. to D.R.
8/12/5/04

Respondent : The State of Chhattisgarh, through the District Magistrate Raipur.

MEMORANDUM OF CRIMINAL APPEAL UNDER SECTION 374(2) OF Cr.P.C.

Conviction Sentence

(57)

(58)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.459/2004

Mohan Yadav

Vs.

State of Chhattisgarh

Post for Judgment : 7.07.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(38) (51)

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**Cr. Appeal No.459/2004**

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Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

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Mohan Yadav

Versus

The State of Chhattisgarh

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*Shri Awadh Tripathi, Counsel for the appellant.*

Shri Parag Kotecha, Panel Lawyer for the State.

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**JUDGMENT**

(Delivered on this 7th day of July 2006)

This appeal is directed against the judgment dated 15.04.2004 delivered by Shri Anil Kumar Shukla, Additional Sessions Judge, Raipur in Sessions Case No. 27/04 whereby the appellant was convicted under Section 376 & 450 I.P.C. and sentenced to undergo rigorous imprisonment for three years and a fine of Rs.2,000/- and in default to undergo R.I. for 6 months under Section 450 I.P.C and to undergo rigorous imprisonment for ten years and a fine of Rs.3,000/- and in default to undergo R.I. for one year under Section 376 I.P.C.

2. Briefly stated the prosecution story is that on the night of 4.9.2003 at about 12.00 P.M. the prosecutrix, aged about 16 ½ to 18 years and a girl of unsound mind was inside the house. Narendra Kumar P.W.1, brother of the prosecutrix came out for attending a call of nature. On returning to his room, his wife Bhuneshwari Bai P.W.3 asked him about the person who had entered the room of the prosecutrix. Upon this, Narendra Kumar went to the room of the

prosecutrix and switched the light on and found the appellant sitting on the cot of the prosecutrix with only a towel wrapped along the waist. Narendra Kumar caught hold of the appellant and slapped him. Bhuneshwar Bai P.W.3 and Devkunwar P.W.2, mother of the prosecutrix also arrived there. The appellant ran away. On being asked, the prosecutrix told them that the appellant had committed sexual intercourse with her.

3. F.I.R. was lodged by Narendra Kumar on 6.9.2003 at about 1.00 P.M. During investigation, it was found that the prosecutrix was undergoing treatment since April 1992 for psychological disorder. Treatment papers Ex.P.3 & 4 were seized vide seizure memo Ex.P.2. The prosecutrix was medically examined by Dr. Mrs. A. Dutt P.W.8 on 6.9.2003 who found that her hymen was torn and admitted one finger easily. There was no tenderness. It was opined that sexual intercourse had been committed on the prosecutrix. However, no definite opinion regarding forceful sexual intercourse could be given. No external injuries were found on her person. Two vaginal slides were prepared. Dr. Preeti Agrawal, Assistant Professor of Obstetrics and Gynaecology P.W.10 examined the prosecutrix on 7.9.2003 and reiterated the findings and opinion given by Dr. Mrs. A. Dutt. The appellant was examined by Dr. Y.C. Mihsra P.W.9. and found that the appellant was capable of performing sexual intercourse. Radiological examination of the prosecutrix for estimation of her age was done and as per report of Ossification test, it was opined that she was aged between 16 ½ to 18 years. On 7.10.2003 the prosecutrix was examined by Dr. Mrs. A. Dutt who opined that she was a psychiatric patient and undergoing treatment at Dr. B.R.Ambedkar Medical College Hospital. Dr. M.K.Sahu also examined the prosecutrix on 7.10.2003 and opined that she was a known case of psychosis and undergoing treatment at the above mentioned hospital. After

completion of investigation, the appellant was prosecuted under Section 450 and 376 I.P.C.

4. The appellant abjured the guilt, pleaded innocence and false implication due to previous enmity and quarrel between the two families. No evidence in defence was led. The prosecution examined as many as 13 witnesses. The learned trial Judge, relying upon the evidence led by the prosecution, convicted and sentenced the appellant as aforesaid in para 1.

5. Shri Awadh Tripathi, learned counsel for the appellant has, at the very out set, submitted that he would assail the conviction of the appellant only on the ground that the appellant had gone to the house of the prosecutrix at 12.00 in the night on 4.9.2003 and committed sexual intercourse with the prosecutrix with her consent. He did not argue against the reliability of the testimony of Narendra Kumar P.W.1, Devkunwar P.W.2 and Bhuneshwari Bai P.W.3 but focused his argument only on the admission of the prosecutrix that she was naked and smiling at the time of commission of rape by the appellant and that she liked the sexual act committed on her by the appellant. No other ground was urged in this appeal. On the other hand, Shri Parag Kotecha, learned Panel Lawyer for the State while arguing in support of the impugned judgment contended that the evidence led by the prosecution clearly revealed that the prosecutrix was a person of unsound mind and was unable to understand the nature and consequences of the sexual act. It was urged that under *Fifth* description of Section 375 I.P.C., sexual intercourse with the consent of a woman who by reason of unsoundness of mind, was unable to understand the nature and consequences of the sexual act to which she gave consent, legally amounted to rape.

6. Having considered the rival submissions, I have perused the record. The testimony of the prosecutrix P.W.4 that the appellant

came inside her room at night and committed sexual intercourse with her is fully corroborated by her brother Narendra Kumar P.W.1 who saw the appellant inside the room of the prosecutrix at 12.00 in the night with only a towel on his body and also by the testimony of Devkunwar P.W.2, mother of the prosecutrix to whom the prosecutrix had narrated that the appellant had sexual intercourse with her. The above evidence is also corroborated by Bhuneshwari Bai P.W.3 who also saw the appellant inside the room of the appellant at the dead of night and to whom the prosecutrix told on the next day that the appellant had committed sexual intercourse with her. The medical evidence of Dr. Smt. A. Dutt P.W.8 also establishes that on 6.9.2003 she found that that hymen of the prosecutrix was torn. Dr.Smt. Preeti Agrawal P.W.10 also reiterated the findings given by Dr. Smt. A. Dutt P.W.8 and opined about the possibility of sexual intercourse with the prosecutrix. The credibility of the above evidence was not challenged in this appeal. Thus, the learned trial Judge has rightly concluded that the appellant entered the house of the prosecutrix at the dead of night of 4.9.2003 and committed sexual intercourse with her. This finding has not been assailed by the learned counsel for the appellant during arguments on the ground that the sexual intercourse with the prosecutrix was wholly with her consent.

7. The only point that requires consideration in this appeal, therefore, is whether the appellant had committed sexual intercourse with the prosecutrix with her consent. It is not disputed that the prosecutrix was a girl aged more than 16 years on the date of occurrence. Section 375 of the I.P.C. carves out an exception under clause *Fifth* where sexual intercourse even though it was committed with the consent of the prosecutrix, amounts to rape where the woman while giving consent to sexual intercourse was by reason of

unsoundness of mind unable to understand the nature and consequences of the sexual act to which she gave consent.

8. Learned counsel for the appellant has argued that the testimony of the prosecutrix shows that she was naked and smiling while the appellant was committing sexual intercourse with her and had liked the sexual act of the appellant which clearly proved consent of the prosecutrix. However, as pointed above, such consent would be inconsequential if the evidence led by the prosecution would show that by reason of unsoundness of mind she was unable to understand the nature and consequence of the sexual act to which she gave consent. Not only during trial but also during arguments before the learned trial Judge, the appellant had not taken the plea that sexual intercourse committed by him with the prosecutrix was with her consent due to which this aspect neither emerged during cross-examination of the prosecution witnesses or in the examination of the accused under Section 313 Cr.P.C. nor was dealt with in the judgment delivered by the learned trial Judge.

9. Narendra Kumar P.W.1 has stated that the mental faculty of the prosecutrix was not fully developed. Her capacity to comprehend and think was weak and she would smile without reason. Devkunwar P.W.2, mother of the prosecutrix, also stated that the prosecutrix was mentally weak and unable to comprehend things. Bhuneshwari Bai P.W.3 also deposed that being mentally weak the prosecutrix was undergoing treatment though she had improved and used to talk properly. The learned trial Judge noted the demeanor of the prosecutrix before recording her evidence that she did not appear to be a balanced woman since for no reason she would start smiling, although sometimes she would be able to answer the questions after understanding them. Dr. Smt. A. Dutt P.W.8 has testified that father of the prosecutrix had told her that the prosecutrix was undergoing

psychiatric treatment since last 4 years, and therefore, she had referred the prosecutrix to the Medical College. Although Dr. Smt. Preeti Agrawal P.W.10, Assistant Professor, Medical College, Raipur has stated that the prosecutrix was a normal woman and was able to comprehend the conversation, Dr. M.K.Sahu P.W.13, Assistant Professor in Psychiatrics, B.R.Ambedkar Hospital, Raipur stated that the prosecutrix was undergoing treatment for schizophrenia and had improved though she used to smile without reason and would not take care of her clothes. The entire evidence led by the prosecution, as mentioned in this paragraph, stood unrebutted in cross-examination. The appellant did not take the defence that sexual intercourse committed by him with the prosecutrix was with her consent. He took the plea that the appellant was falsely implicated because of enmity since mother of the prosecutrix was called a witch by the mother of the appellant and the two families were not on talking terms. If such were the circumstances, the prosecutrix, had she been of sound mind, would have never permitted the appellant to commit sexual intercourse with her.

10. Having considered the evidence led by the prosecution, as mentioned above, I am of the considered opinion that at the time of sexual intercourse, the prosecutrix was, by reason of unsoundness of mind, unable to understand the nature and consequences of the sexual act committed by the appellant. There is nothing on record to show that the prosecutrix had called the appellant at her house at the dead of night. Her testimony clearly shows that at the time of sexual intercourse she was smiling since she felt that the appellant was her husband. Under the description *Fourthly* of Section 375 I.P.C. a man is said to commit rape who has sexual intercourse with a woman even with her consent when he knows that he is not her husband, and that her consent is given because she believes that he is another man to

whom she is or believes herself to be lawfully married. Even if the testimony of the prosecutrix is to be believed, it would clearly show that she consented to sexual intercourse by the appellant assuming that the appellant was her husband. The evidence led by the prosecution shows that she was completely unable to understand the nature and consequence of the sexual act due to unsoundness of mind. The sexual act committed on her by the appellant clearly falls within the definition of rape under Section 375 I.P.C.

11. On being asked by the learned trial Judge about the factum of resistance or the fact that she was naked, the prosecutrix remained quiet and did not answer. Dr. M.K. Sahu P.W.13 has clearly stated that the prosecutrix, a patient undergoing treatment for schizophrenia did not care about her clothes. Considering the evidence of Narendra Kumar P.W.1, Devkunwar P.W.2, Bhuneshwari Bai P.W.3 and the demeanor noted by the learned trial Judge it is clear that the prosecutrix used to smile without reason. I am of the considered opinion that at the time of commission of sexual act, the prosecutrix was, due to unsoundness of mind, unable to understand the nature and consequence of the sexual act being committed by the appellant with her. Neither her being naked nor the fact that she was smiling during the sexual intercourse would, in the aforesaid circumstances, amount to her free consent.

12. There is absolutely no material on record to show that the appellant and the prosecutrix were in love with each other and were on visiting terms. On the contrary, the testimony of Narendra Kumar P.W.1 and Devkunwar P.W.2 clearly shows that the two families were not even on talking terms due to the fact that mother of the appellant had alleged that Devkunwar was a witch. In these circumstances, it cannot be comprehended that the prosecutrix would have called the appellant at her room at the dead of night for having sexual

intercourse or had knowingly and of her own free will consented to the sexual intercourse. Since the evidence led by the prosecution is wholly unrebutted, in the facts and circumstances mentioned above, it is established that at the time of commission of sexual act by the appellant, the prosecutrix was, by reason unsoundness of mind unable to understand the nature and consequences of the sexual act to which she did not resist.

13. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the contention of the learned counsel for the appellant must be rejected *in toto.*

14. In the result, Conviction of the appellant under Sections 450 and 376 I.P.C. and the sentence awarded by the learned trial Judge thereunder are well founded and do not call for any interference. The appeal is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge